U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 18 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a high school chemistry teacher in New York, New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and background information from the New York State Education Department (NYSED).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 1, 2012. The petitioner signed Part 8 of the form under penalty of perjury, certifying "that this petition and the evidence submitted with it are all true and correct." Part 4, line 6 of the petition form asked: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner answered "No." This answer, however, is incorrect. USCIS records show that the New York City Department of Education (NYCDE) filed a Form I-140 petition on the alien's behalf on March 11, 2008, with an approved labor certification filed on November 20, 2007. The Texas Service Center approved that petition, classifying her as a

professional under section 203(b)(3) of the Act. The alien beneficiary of that petition (the self-petitioner in the present proceeding) signed Part L of the ETA Form 9089 labor certification application, so she was demonstrably aware of NYCDE's filing.

On Part 3 of Form I-140, the petitioner indicated that she held H-1B nonimmigrant status, valid through May 14, 2012. USCIS records show that NYCDE was the petitioning employer for that status. The petitioner's H-1B nonimmigrant status did not authorize her to work for any employer other than NYCDE. *See* 8 C.F.R. § 274a.12(b)(9).

The petitioner filed Form ETA-750B, Statement of Qualifications of Alien, at the same time as the petition, on May 1, 2012. Part 15 of that form instructed the petitioner to "[l]ist all jobs held during the last three (3) years. Also, list any other jobs related to the occupation" in which the petitioner now seeks employment. On the form, the petitioner listed only one job, teaching for "New York Public Schools" from November 2005 to August 2010. The petitioner claimed no employment after August 2010. By signing Form ETA-750B, the petitioner declared under penalty of perjury that the information on that form was true and correct.

Concurrently with her Form I-140 petition, the petitioner filed a Form I-485 adjustment application on May 1, 2012. The petitioner signed Part 5 of the adjustment application, thereby certifying "under penalty of perjury . . . that the information provided with this application is all true and correct." As part of the adjustment application package, the petitioner completed and signed Form G-325A, Biographic Information, which cautioned: "Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact."

Instructed to list her residences over the past five years, the petitioner listed four addresses, all in New York City (one in Queens, three in the Bronx). Instructed to list her employment over the past five years, the petitioner listed three employers:

	Occupation	From	To
	Chemistry Teacher	Nov 2005	Aug 2010
	Asst Teacher	Oct 2010	Mar 2011
	Lead Teacher	Mar 2011	Present

A résumé submitted with the Form I-140 petition indicated that the petitioner as lead teacher to Toddlers (ages 18 months to 36 months)." The petitioner did not explain how she has worked for an employer in Washington since 2011 if she resided in New York at the time.

The information that the petitioner provided on the above-listed forms is inconsistent with respect to her whereabouts and employment after August 2010. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner does not explain why, if she was already working as a high school chemistry teacher in New York

and intends to do so in the future, she (in her words) "shifted in her career path" by leaving that job to work at day care centers.

The petitioner submitted letters from administrators, teachers, and former students, praising the petitioner's skill, dedication, and personal character. The petitioner also submitted copies of certificates establishing her professional training and acknowledging her service, and satisfactory performance evaluations (the most recent of which dates from June 2009). Neither counsel nor the petitioner addressed the guidelines set forth in *NYSDOT*.

The director issued a request for evidence on June 20, 2012, instructing the petitioner to "submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation."

In response, the petitioner submitted background materials about the importance of science education. These materials establish the intrinsic merit of science education, but they do not show that the petitioner qualifies for a waiver of the job offer requirement that, by statute, normally applies to science teachers.

Counsel asserted that the petitioner's "proposed employment as a 'Highly Qualified Chemistry (STEM) Teacher' is national in scope and . . . will impart national-level benefits." Counsel cited various federal initiatives aimed at reforming or improving public education, particularly the No Child Left Behind Act (NCLBA). One of the submitted supporting exhibits, a *Wall Street Journal* article entitled "Rising to the Challenge," quoted executive director of the National Science Teachers Association, as stating: "The focus of the No Child Left Behind Act . . . has been on literacy and mathematics, and so we have a whole group of students not being adequately prepared for science careers." Counsel quoted this passage, and other materials that refer to a continuing decline in United States education after the passage of the NCLBA, without acknowledging that this evidence undermines the claim that the NCLBA has improved science education. The petitioner provided no evidence that she arrested or slowed that downward trend during the several years that she taught high school science in the United States.

Counsel stated that approving the waiver is "economically wholesome to the United States Government instead of waiting for more than 2 centuries until U.S. workers become as highly qualified as she is." Counsel did not explain how the petitioner's 25 years of experience place her is "2 centuries" ahead of United States science teachers. To support the claim that the petitioner will benefit the entire United States, counsel cited the economic burdens that undereducated workers place on society. The petitioner provided no evidence to show the extent to which her past work has alleviated those burdens.

Counsel stated that the Department of Labor, for labor certification purposes, holds that the petitioner's position "require[s] only a bachelor's degree, [and therefore] would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind." Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." One of the criteria

for that designation is that the teacher "holds at least a bachelor's degree." Therefore, the wording of the statute does not support counsel's implied claim that the NCLBA mandates the hiring of teachers with advanced degrees.

The director denied the petition on December 18, 2012. The director described several of the submitted exhibits and quoted the witness letters, but concluded: "The petitioner's employment is limited to a local impact. The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all teachers." The director added that the petitioner's credentials do not cause the benefits from her work to be national in scope.

On appeal, the petitioner submits a 50-page printout of "How Adequate Yearly Progress (AYP) Is Determined Using 2011-12 Data," an electronic slide presentation prepared by the NYSED. This document amounts to background evidence at best, and does not establish a blanket waiver for science teachers.

In the appellate brief, counsel asserts that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claims that Congress subsequently filled that gap with the passage of the NCLBA. Counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "[t]he obscurity in the law that NYSDOT sought to address has been clarified," because "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel does not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel contends that the petitioner "has submitted legal, testimonial as well as documentary evidence including logical and practical reasoning that establish the benefit derived by the United States from her employment is national in scope." Counsel does not elaborate or identify this claimed evidence. The national importance of "education" as a concept, or "educators" as a class, does not establish that the work of one teacher produces benefits that are national in scope. *See NYSDOT*, 22 I&N Dec. 217, n.3. A local-scale contribution to an overall national effort does not meet the *NYSDOT* threshold. The aggregate national effect from thousands of teachers does not give national scope to the work of each individual teacher.

Counsel contends that the petitioner's "contribution in raising student achievement in Science . . . enfleshes the Obama Education Programs' priority of having a great teacher in every classroom." The petitioner has not documented the extent to which she "rais[ed] student achievement in Science" between 2005 and 2010. Counsel protests that the *NYSDOT* national interest test relies on "hypotheticals" that cannot be measured, but counsel's own claims rest in large measure on hypothetical assertions. One such hypothetical claim – that the labor certification process cannot take the petitioner's qualifications into account – conflicts with documented fact. The petitioner did in fact receive an approved labor certification, which overcomes any speculation that she might have difficulty securing a labor certification.

Counsel cites nine previously submitted exhibits as "overwhelming evidence" of eligibility. One of these exhibits is a certificate showing that the petitioner was a coach for students in an English essay writing contest in the Philippines. This document has no evident relevance to the petitioner's abilities as a high school chemistry teacher. Some other certificates simply acknowledged length of experience, which is not grounds for granting the waiver. The record does not support counsel's claim that these materials are "overwhelming evidence" in the petitioner's favor.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision in *NYSDOT* is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials.

Counsel claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As noted previously, the threshold for exceptional ability is below, not above, the threshold for the national interest waiver. It remains that the petitioner's evidence does not establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school districts where she has worked.

Counsel, on appeal, states that the labor certification guidelines "require only a bachelor's degree" for special education teachers, and therefore "would not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." Elsewhere in the same brief, however, counsel acknowledges that the statutory definition of a "Highly Qualified Teacher" requires only a bachelor's degree. Counsel does not reconcile these contradictory claims.

Counsel states that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. Furthermore, the petitioner has provided conflicting information that casts doubt on fundamental claims and indicates that she has left the occupation on which the waiver request rests. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.